

Limitations Act, 2002 and October 19, 2006 Amendment Don't Destroy Your Records Just Yet!

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Summary

The *Limitations Act, 2002* came into effect on January 1, 2004. It reduced from six years to two years the “discovery period” during which a claim may be filed after the cause of the claim is, or ought to have been, discovered. The *Act* also introduces an ‘ultimate limitation’ period of fifteen years. There are transition rules respecting services provided before January 1 2004. There are also exceptions to the limitations period. Architects are reminded to retain their records for the purpose of defense against claims until the end of the limitation period applicable to each project.

An amendment to the *Limitations Act 2002* received Royal Assent on October 19, 2006 to provide for parties in a contract to agree under certain circumstances to vary the prescribed time to make a claim following discovery of the cause of a claim or when it ought to have been discovered. In addition, the ultimate limitation period may be varied in very specific circumstances.

Background

1. The Limitations Act, 2002 came into effect January 1, 2004 and represents a complete overhaul of limitations legislation in Ontario. An amendment to the Limitations Act, 2002 received Royal Assent on October 19, 2006.

The following is a general summary of the provisions of the Limitations Act and amendment thereto as applicable to architects. It is not to be construed as legal advice. As there are exceptions and transition rules, and as this legislation is both comprehensive and relatively new, architects are advised to seek advice of legal counsel in every specific circumstance that may arise, and in particular if a request to alter the limitation periods is received by or intended by the architect.

2. The ‘discovery period’ is the time within which litigation must be commenced dating from the point in time where the cause of the claim was discovered, or ought to have been discovered. Prior to January 1, 2004, the discovery period was six years.

There was no ‘ultimate limitation’ period for claims against architects under the previous legislation. Claims could be made against architects until their death, and in certain circumstances, against their estate.

3. The Limitations Act, 2002 reduces the ‘discovery period’ from six years to two years. This is seen as a significant benefit to architects as it requires that the claim be advanced much more quickly, while memories are fresh and evidence is readily available. The 2006 amendment to the Act provides, in certain circumstances, that parties in a contract can agree to change the 2 year discoverability period, as explained later in this document.

The Act also establishes, for the first time, an ‘ultimate limitation’ period of 15 years. “No proceeding shall be commenced in respect of any claim after the 15th anniversary of the day on which the act or omission on which the claim is based took place.” Limitations Act, 2002 s.15(2). This provision in the Act has also been amended to provide for contracting parties to agree to alter the ultimate period in certain circumstances, as explained later in this document.

[Comment: The design and construction sector recommended strongly to the government that the legislation instead establish a fixed date, such as the date of Substantial Performance, to initiate the limitation period. The industry noted that this provision creates uncertainty and may result in different parties to an action having different start dates (and thus end dates) for limitation periods. However, the government decided to draft legislation for broad application, declining to include references specifically for this industry. The circumstances of each situation, and ultimately the courts, will determine the applicable dates.]

The transition rules created by the Limitations Act, 2002 for services provided by architects or others prior to January 1, 2004 were the subject of a case heard by the Ontario Court of Appeal on October 17, 2006. In the case under appeal, the alleged error occurred in 1978 when a condominium building was erected with demising walls which were not fire rated. The problem was discovered in 2004. The condominium corporation sued the developer and the City of Toronto in 2005. The Court held that the claim had expired as it was commenced longer than 15 years after the act or omission took place. The claimant appealed and argued that under the transition rules, the ultimate limitation period for services provided prior to January 1, 2004 would run from January 1, 2004 if the claim was discovered after that date. The Court of Appeal allowed the appeal and decided that the starting date of the limitation period was January 1, 2004. As the error occurred before January 1, 2004 but was discovered after that date, the Act applied as if the error or omission occurred on January 1, 2004. The 2 year limitation period started to run in May, 2004, when the owner discovered that the demising walls were not fire rated. Its action was commenced in June, 2005 within the 2 year limitation period.

In other words, if an error or omission occurs before January 1, 2004 but is only discovered after that date, the ultimate limitation period expires up to 15 years later (on January 1, 2019) subject to the 2 year limitation period which starts to run from the date that the claim is actually discovered.

4. There are exceptions to the limitations period, for example, in cases of sexual assault, or where an environmental claim, as defined in the statute, has not been discovered. In addition, the limitation period does not run continuously under certain circumstances.
5. Whereas the Limitation Act, 2002 did not permit parties to change the limitation period by contract the amendment as of October 19, 2006 provides in certain cases that the period may be varied by agreement.
6. Architects and their employees are urged to review the Limitations Act, 2002 and subsequent amendment in force as of October 19, 2006.
7. The principal elements of the 2006 amendment to the Limitations Act, 2002 are as follows:

Different rules apply to consumers and business agreements.

 - a) The 2 year discovery period in business agreements may be excluded, extended, shortened or suspended by agreement of the parties to the contract.
 - b) The 2 year discovery period in non-business agreements may be suspended or extended by an agreement made on or after October 19, 2006.
 - c) The ultimate limitation period in business agreements (15 years in the *Limitations Act, 2002*) may be extended, shortened or suspended by an agreement of the parties made on or after October 19, 2006, except that it may be suspended or extended only if the relevant claim has been discovered. (i.e. in this case it cannot be shortened).
 - d) The ultimate limitation period in non-business agreements (15 years in the *Limitations Act, 2002*) may be extended, or suspended by an agreement made on or after October 19, 2006 but only if the relevant claim has been discovered.
 - e) "business agreement" means an agreement made by parties none of whom is a consumer as defined in the *Consumer Protection Act, 2002*.

8. Architects are reminded to retain their records until the end of limitation period applicable to each project. These records are essential in defending any claim which may arise against the architect. [Comment: Do not confuse this advice with the position of the Canada Customs and Revenue Agency which would suggest that financial records may be destroyed after seven years. Certain financial records, for instance records of invoices and payments, can be very important in defending against a claim relating to an alleged error or omission in the provision of professional services.]
9. The Limitations Act, 2002 may also impact aspects of practice such as employer/employee relationships, for example, in the case of allegations such as wrongful dismissal.

Suggested Procedure

1. Review the *Limitations Act, 2002 and the amendment thereto* which received Royal Assent on October 19, 2006.
2. Ascertain which rules under the amended legislation will apply to each specific project.
3. If there is an anticipation that you might be participating in an agreement to change the limitation periods (ultimate 15 year and/or 2 year discovery) confer with legal counsel and, if appropriate, your professional liability insurer before agreeing to the changes.
4. Develop a system for archiving records of each project, tracking the limitation period applicable to each. (This may also present a useful opportunity to review your procedures for 'backing up' electronic files.)
5. Prior to destroying records, it is recommended that you seek confirmation from your legal counsel that the limitation period has expired.
6. If you dispose of records, do so in accordance with the applicable provisions of the Personal Information Protection and Electronic Documents Act, which is federal legislation that came into effect January 1, 2004 for private businesses including architectural practices.

References

Review at [Limitations Act, 2002](#).

Review at [Consumer Protection Act, 2002](#)

[Personal Information Protection and Electronic Documents Act](#) (PIPEDA)

The OAA does not provide legal, insurance or accounting advice. Readers are advised to consult their own legal, accounting or insurance representatives to obtain suitable professional advice in those regards.
